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No. 407

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

RALPH NEELY, *Petitioner,*

v.

HOUSTON OILERS, INC., *Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*To The Honorable Judges Of The Court:*

Respondent HOUSTON OILERS, INC., prays that the Petition for Writ of Certiorari of RALPH NEELY be denied, and would show that the requisite grounds do not exist for review of the Judgment of the United States Court of Appeals for the Tenth Circuit entered May 18, 1966.

## OPINIONS IN THE COURTS BELOW

The Opinion of the Court of Appeals is printed in Appendix "A" hereto. The Findings of Fact and Conclu-

sions of Law of the District Court appear in the record. (D.R. 121-136)[1]

## JURISDICTION

The Judgment of the Court of Appeals was entered on May 18, 1966. (A.R. 4) Rehearing was denied on June 23, 1966. (A.R. 10)

Petitioner seeks to invoke jurisdiction of this Court under Title 28, U.S.C., Sec. 1254(1). Respondent would however show that there are neither special nor important reasons for review of this cause on writ of certiorari; that no conflict here exists between decisions of Courts of Appeals and that the Court of Appeals correctly applied the Texas law pertaining to the Texas Statute of Frauds, Article 3995, Texas Revised Civil Statutes.

## STATUTE INVOLVED

The Texas Statute of Frauds, Article 3995, Texas Revised Civil Statutes is printed in Appendix "B" hereto.

## QUESTIONS PRESENTED

1. Did the Court of Appeals abuse its discretionary powers when it refused to apply the equitable "clean hands" doctrine and granted injunctive relief to enforce a contract provision in a case where a professional football team and a college football player, without fraud or deceit, entered

[1] The record is comprised of the Transcript of Record from the Court of Appeals which incorporates the Record and Transcript of the District Court. Each document begins with a page one. References to the various parts of the record will be made as follows: Court of Appeals record—A.R.; District Court Record—D.R.; District Court Transcript—Tr.

into valid written contracts prior to a post-season college game, the parties had an extrinsic oral understanding that the existence of the contract would not be publicized until after the game, and where the college player did not play in the post-season game?

2. Did the Court of Appeals correctly apply Texas law in holding that the service station agreement (Tr. 36, Pl.'s Ex. 7) meets the requirements of the Texas Statute of Frauds, Art. 3995, Texas Revised Civil Statutes, where the instrument is in writing, is signed by the parties, and provides a method of certain and final identification of the property by giving one of the parties the unqualified right of selection without the necessity of further agreement by the other party?

3. Is the issue that Ada Oil Company is an indispensable party a proper one for consideration in acting upon a Petition for Writ of Certiorari where such issue has been raised for the first time on Petition for Rehearing in the Court of Appeals after Respondent has alleged, the Petitioner has admitted, and the Court of Appeals has held, that the contract involved was made by Respondent and Petitioner?

If so, then the question presented is whether or not Ada Oil Company is an indispensable party where it entered into an agreement on which it has secondary or derivative liability and with respect to which Respondent is the real party in interest.

4. Is the issue that the Dallas Cowboys Football team is an indispensable party a proper one for consideration in acting upon a Petition for Writ of Certiorari where such issue is raised for the first time in the Petition for Writ of Certiorari?

If so, then the question presented is whether the Dallas Cowboys Football team is an indispensable party to this action by Respondent seeking a declaratory judgment that a valid contract exists between the Houston Oilers and Ralph Neely and an injunction restraining the violation by Petitioner of a provision of the contract because Petitioner has made a separate and distinct contract with such third party.

## STATEMENT OF THE CASE

In this action filed in the United States District Court for the Western District of Oklahoma, Respondent, Houston Oilers, Inc., seeks a declaratory judgment that there exists a valid, enforceable written contract between Respondent and Petitioner, Ralph Neely, that he play professional football for the Houston Oilers team of the American Football League, and an injunction permanently restraining and enjoining Petitioner from playing football with any other team during the term of the contract. (D.R. 1-45)

Jurisdiction of the District Court was based upon diversity of citizenship. Respondent is a Texas corporation. Petitioner was, at the institution of suit, a resident of Oklahoma. (D.R. 109-110)

After a non-jury trial, the District Judge entered judgment that the contract between the parties was invalid and of no force and effect, denied the application for declaratory judgment and for injunction, and dismissed the Complaint with prejudice. (D.R. 136)

Respondent perfected an appeal to the Court of Appeals for the Tenth Circuit. The Court of Appeals held that the undisputed facts in the record disclosed a valid and

enforceable contract (A.R. 3 p. 3); that there is insufficient evidence to sustain a finding of material misrepresentation on the part of Houston amounting to fraud which would affect the validity of the contracts (A.R. 3 p. 12); that the Standard Players' Contracts, the Letter Agreement for Additional Employment, and the Filling Station Agreement constituted a single transaction (A.R. 3 p. 5); that the maxim (clean hands doctrine) admits of the free exercise of judicial discretion in the furtherance of justice (A.R. 3 p. 13); that it is neither unlawful nor inequitable for college football players to surrender their amateur status and turn professional at any time (A.R. 3 p. 13); that Houston was under no legal duty to publicize the contract or to keep it secret (A.R. 3 p. 13); that the Player Contract in *New York Football Giants v. Los Angeles Chargers Football Club, Inc.*, (5th Cir.) 291 F.2d 471, was acquired under circumstances much different from those in this case, (A.R. 3 p. 13) and that the service station agreement is a writing which satisfies the Texas Statute of Frauds, (A.R. 3 p. 14)

The Court of Appeals reversed and remanded with instructions to grant the injunction. (A.R. 3 p. 4)

Petitioner, for the first time while his Motion for Rehearing was pending in the Court of Appeals, by motion, (A.R. 5) made the contention that Ada Oil Company was an indispensable party. The Court of Appeals having already held on the undisputed record that the contract, including the service station agreement was between Respondent and Petitioner, such Motion was overruled. (A.R. 3 p. 10) Petitioner, for the first time in the Petition for writ of certiorari has raised the contention that the Dallas Cowboys Football Club is an indispensable party to this action.

On Motion of Petitioner, the mandate of the Court of Appeals has been stayed until final disposition by this Court.

## STATEMENT OF FACTS

Respondent owns and operates a professional football team known as the Houston Oilers which is a member of the American Football League. Petitioner, Ralph Neely, on December 1, 1964 was a student at the University of Oklahoma and a member of the Oklahoma University football team (D.R. 109-110) which team was scheduled to play in the Gator Bowl game on January 2, 1965. (D.R. 112) Under the provisions of the American Football League Constitution and By-Laws, (AFL Constitution and By-Laws, VIII, Section 10, Pl.Ex. 9, D.R. 113) Ralph Neely became eligible to be selected and placed under contract by a member team of the American Football League at the time of the American Football League draft held on November 28, 1964. Ralph Neely was selected by the Houston Oilers as one of its draft choices. He was also selected by the Baltimore Colts in the National Football League draft held the same day.

Ralph Neely and his father-in-law, Robert A. Forte, travelled to Houston, Texas, where they met with K. S. Adams, Jr. and Carroll Martin of the Houston Oilers on November 30, 1964, and again on December 1, 1964 to discuss the terms under which Ralph Neely would agree to play professional football for the Houston Oilers. (Tr. 47, 52)

Under the undisputed testimony at the time of the contract discussions, Ralph Neely for tax reasons desired to obtain his $25,000 players' bonus in 1964 so that the

amount of the bonus could be included in his 1964 income. (Tr. 23, 49, 89, 205) Neely knew that if he took money for playing football it would make him ineligible to play college football. (Tr. 198) Neely was told by Mr. Adams that if he wanted his bonus money in 1964 he would have to sign a contract. (Tr. 91)

On December 1, 1964, Ralph Neely, K. S. Adams, Jr., (President and sole stockholder of both Houston Oilers, Inc. and Ada Oil Company) and Carroll Martin executed the Houston contract documents. (Pl. Ex. 1-7, Def. Ex. 1-5, D.R. 170-194, 214-234) The Standard American League Football contract forms executed by the parties provided in part:

> "1. The term of this contract shall be from the date of the execution hereof until the first day of May following the close of the football season commencing . . .
>
> "18. Upon its execution this contract shall be valid and binding immediately upon the parties hereto. A copy of this contract shall be filed by the Club with the Commissioner within ten (10) days after execution . . ."

Ralph Neely received a copy of each of the Houston contract documents, together with the Houston bonus money check. (Pl.Ex. 8, D.R. 111, Tr. 60)

A copy of each of the American Football League Standard Players' Contract forms, with attachments, signed by Neely was submitted by the Houston Oilers to the American Football League Commissioner on December 9, 1964, pursuant to the contract provision that "a copy of this contract shall be filed by the Club with the Commissioner within ten days after execution." The Commis-

sioner took no action to disapprove or to terminate the contract. (Tr. 124, 128; depositions of Woodard and Foss)

For a considerable period of time after he made the arrangement with Houston, Neely admittedly was completely satisfied with it and intended to play football for Houston. (Tr. 194) Dallas somehow obtained Neely's National Football League draft rights from Baltimore. Neely was contacted time and again by representatives of the Dallas Cowboys football team of the National Football League and was told by them that his contract with Houston was invalid. (Tr. 230, Joe Brandt deposition, p. 20)

On December 29, 1964, Ralph Neely signed and caused to be mailed the letters. (Def.Ex. 6-7, D.R. 240-242) On the same date Robert A. Forte signed and mailed a letter (Def.Ex. 8, D.R. 243) returning the Houston bonus check. (Pl.Ex. 8, D.R. 195)

Neely received the $25,000 Dallas Cowboy bonus check on December 31, 1964, prior to the time he was declared ineligible to play in the Gator Bowl football game. He reported the $25,000 as 1964 income. (Tr. 161, 174-175) Neely himself told the Oklahoma University coach that he had signed the Houston contract papers and had sent the letters dated December 29, 1964. (Tr. 200-202) On January 1, 1965, Neely was declared ineligible to play in the Gator Bowl game. (Tr. 162)

On January 1, 1965, Neely signed contracts to play professional football with the Dallas Cowboys of the National Football League during the football seasons commencing in the years 1965 through 1968. He, in fact played with the Dallas team during the 1965 season and admits that he will continue to play football for Dallas unless he is

enjoined from so doing. It is stipulated that Neely possesses special, exceptional, unique knowledge, skill and ability as a football player. (D.R. 111)

## ARGUMENT OPPOSING GRANTING OF THE WRIT

### 1. The Decision of the Court of Appeals for the Tenth Circuit is Not in Conflict With the Decision of the Court of Appeals For The Fifth Circuit in New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 (1961).

The considerations governing review on certiorari, now set out in Rule 19 of the Supreme Court Rules, make it clear that a review on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor.

This Court has said in *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498 at page 502, 95 L.Ed. 497, 482, that:

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.Ct. 422."

A similar holding was made in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79, 99 L.Ed. 897, 904, 75 S.Ct. 614.

For the requisite real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal to exist, the conflict must be well defined. An apparent inconsistency in the principles announced, or in the application of recognized principles is not sufficient. The rulings must be so for upon the same state of facts that the decision of one case should be necessarily conclusive of the decision in the other.

The opinion of the Courts of Appeal for the Tenth Circuit in the instant case and that of the Fifth Circuit in the case of *New York Football Giants v. Los Angeles Chargers Football Club, Inc.*, (C.A. 5) 291 F.2d 471, reveal that the two cases are plainly distinguishable on the facts.

In *New York Football Giants v. Los Angeles Chargers, supra,* the evidence supported the trial court's findings of fraud in the inducement of the contract. The testimony of Mora, owner of the New York Football Giants, undisputedly showed that he had made material misrepresentations to Flowers, the college player there involved. The Court of Appeals for the Fifth Circuit said (291 F.2d at page 474):

> "If there had been a straightforward execution of the document, followed by its filing with the Commissioner, none of the legal problems now presented to this Court to untangle would exist . . . .
>
> "When it became apparent from the uncontradicted testimony of Mora that this deceit was practiced in order to bring into being the 'contract' sued upon,

> the trial court should have dismissed the suit without more on the basis of the 'clean hands doctrine.' "

Thus it is clear that what the Fifth Circuit did was to invoke the "clean hands" doctrine to deny injunctive relief where there was evidence of fraud which affected equitable relations existing between the parties.

To the contrary, the Court of Appeals for the Tenth Circuit found that there was insufficient evidence to sustain a finding of material misrepresentation on the part of Houston amounting to fraud which would affect the validity of the contracts. (A.R. 3, p. 12) There was no fraud in the inducement of the contract in the instant case because Neely was not deceived. He demanded and got his bonus in 1964. As stated by the Court of Appeals in its Opinion:

> "Any rational consideration of the evidence leads to the conclusion that all the parties knew that if Neely signed a professional football contract and received money therefor . . . he would consequently become ineligible to compete in the post-season games." (A.R. 3, p. 5)

Also there is an important, basic difference in the contract involved in the *Flowers* case and the contract in the *Neely* case. One of the terms of the Flowers' contract (291 F.2d 471, 473) was that:

> "This agreement shall become valid and binding upon each party hereto only when, as, and if it shall be approved by the Commissioner."

This important contract difference was the basis for the decisions in *Detroit Football Co. v. Robinson,* 186 F.Supp.

933 and *Los Angeles Rams Football Club v. Cannon,* 185 F.Supp. 717. In the instant case, as stated by the Court of Appeals (A.R. 3, p. 6):

> ". . . The contracts provide in plain language that they shall be valid and binding immediately upon execution and that a copy shall be filed with the League Commissioner within ten days thereafter."

At the time he signed the contract documents, Neely asked that the signing not be made public, and was told that the signing would not be publicized until after the Gator Bowl football game. (Tr. 156, 257, 273) *This verbal assurance is not a part of the written contract which Respondent seeks to enforce.*

It is neither unlawful nor unethical for an amateur athlete to turn professional at any time he desires to do so. The only question of ethics arose with respect to Neely's conduct after he had signed the contracts. From the standpoint of the Houston Oilers, their actions, so far as the American Football League was concerned, were governed by the League's Constitution and By-Laws under which Neely was eligible to be signed to a player's contract.

We respectfully submit that the Court of Appeals correctly held that the Houston Oilers were under no duty to publicize the signing of the contract and that it was perfectly proper for Respondent to remain silent.

Regardless of what his intentions originally were, Neely did not play in the post-season game. Prior to the game he disclosed to his coach the facts which brought about a declaration of his ineligibility. (A.R. 3, p. 12; Tr. 200-202)

An important distinction between the two cases with respect to the applicability of the "clean hands" doctrine is that Flowers, the player involved in *Giants v. Chargers, supra,* played in the Bowl game, whereas in the instant case Neely did not play in the game. Consequently there was no actual deception of the Oklahoma football team or of the public generally. The claimed inequitable action was not committed, but only discussed. Compare *Republic Molding Corp. v. B. W. Photo Utilities,* (C.A. 9) 319 F.2d 347, 350.

The opinions of the Courts of Appeal can be readily reconciled on the facts, therefore the requisite real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal does not exist and the petition should be denied. The Court of Appeals' decision is consistent with the pronouncements of this Court applying the equitable "clean hands" doctrine. Petitioner does not even assert that a conflict exists with prior decisions of this Court.

This case merely involves the application of well-recognized, established legal principles to the particular facts. It is not a case involving principles, the settlement of which is of importance to the public as distinguished from that of the parties. The Court of Appeals merely exercised its broad discretionary powers. As stated by the Court (A.R. 3, p. 13):

> "The maxim admits of the free exercise of judicial discretion in the furtherance of justice."

In the language of this Honorable Court in *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 815, 89 L.Ed. 1381, 1386:

> "This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.' Keystone Driller Co. v. General Excavator Co. supra (290 U.S. 245, 246, 78 L.Ed. 296, 297, 54 S.Ct. 146)."

The refusal of the Court of Appeals for the Tenth Circuit to apply the "clean hands" doctrine in a case which it found from the evidence did not involve fraud or deceit on the part of the Respondent does not conflict with the decision of the Court of Appeals for the Fifth Circuit which applied the "clean hands" doctrine to deny relief in a case where the Court found the evidence supported fraud in the inducement of the contract.

**2. The Court of Appeals Correctly Applied Texas Law in Holding that the Service Station Agreement (Pl. Ex. 7), One of the Contract Documents, Meets the Requirements of the Texas Statute of Frauds, Art. 3995, Texas Revised Civil Statutes.**

The decision of the Court of Appeals is not in conflict with the applicable law of the State of Texas.

On December 1, 1964 as a part of a single transaction (Tr. 113, A.R. 3, p. 5) Petitioner, Ralph Neely, executed the Houston contract documents consisting of the Standard American Football League contract forms and the Service Station Agreement. (Pl. Ex. 7, D.R. 110-111) K. S. Adams, Jr. who signed the Service Station Agreement along with Neely, in addition to being the president and owner of all of the capital stock of the Houston

Oilers, Inc., also was the owner of Ada Oil Company and had authority to make this agreement with Neely as a part of the consideration to get him to play football for the Houston Oilers. (Tr. 115)

This Letter Agreement is in writing and is signed by the parties. It therefore complies with the Texas statute of frauds unless it is held that the agreement as a written memorandum, is not a sufficient writing to comply with the statute. Such is not the case.

The agreement states in plain language that Ada Oil Company is to purchase a suitable service station site in Harris County, Texas, to be used for the sale of Phillips '66 products at a cost of from $30,000 to $60,000, and is to arrange for the financing and construction thereon of a service station of a designated type. Ada Oil Company under the Letter Agreement is to also, upon the completion of the construction of the service station, to enter into the standard two-party lease agreements with Phillips Petroleum Company and to procure a loan in an amount equal to the total cost of the service station site and improvements, the amount of which loan is to be paid in two hundred and forty equal monthly installments under the leases.

The parties did not purport to contract with respect to a particular tract of property. However, *because it is clear from the unqualified language of the instrument that the service station site, the type of station, and the financing thereof is to be determined by Ada Oil Company, within the limits specified, and without the necessity of any further agreement on the part of Ralph Neely, the writing satisfies the Texas Statute of Frauds.*

The requirements of the Texas Statute of Frauds are satisfied whenever the contract provides a method of certain and final identification of the property.

Directly in point is the case of *Tiller v. Fields*, (Tex.Civ. App. 1957) 301 S.W.2d 185 wherein the court said at page 190:

> "Appellants in their brief cite the case of Stekoll Petroleum Co. v. Hamilton, 152 Tex. 182, 255 S.W.2d 187. We think a careful analysis of this case will show that it is supportive of appellees' position rather than that of appellants' because it is clearly recognized in the Stekoll case that the statute of frauds is met where the contract, instrument or agreement, gives either party the unqualified right or power to make a selection or determination of the details without the necessity of further agreement or approval of the other party. Also in this connection see Taylor v. Lester, Tex.Civ.App., 12 S.W.2d 1097, wr.ref.; Gray v. Producers' Oil Co., Tex.Civ.App., 227 S.W. 240; Rountree v. Bridwell, Tex.Civ.App., 269 S.W.2d 824, wr.ref., N.R.E.; Lingeman v. Shirk, 15 Ind.App. 432, 43 N.E. 33; Peckham v. Lane, 81 Kan. 489, 106 P. 464, 25 L.R.A., N.S., 967. The lease pooling provision in question in this case clearly gives the lessee the broad and unqualified power to select or determine the lands (in the immediate vicinity) to be placed in the unit . . ."

Other cases which directly support Respondent's position that the writing in question meets the requirements of the Texas Statute of Frauds are *Skeeters v. Granger*, (Tex. Civ.App. 1958) 314 S.W.2d 364, 366, writ ref'd n.r.e., and *Best Building Company v. Sikes*, (Tex.Civ.App. 1965) 394 S.W.2d 57, 62, writ ref'd n.r.e.

Under Texas law, an express or implied reference in one document to another incorporates the latter into the former

so as to allow the two to be considered together in determining whether the statute of frauds has been complied with. *McElroy v. Danciger,* (Tex.Civ.App.) 241 S.W. 1098; *Taylor v. Lester,* (Tex.Civ.App.) 12 S.W.2d 1097, writ ref'd; *Kauffman v. Deignan,* (Tex.Civ.App.) 227 S.W.2d 271, 275. Therefore, the agreement is not made invalid because it incorporates by reference the instruments which describe the improvements to be erected upon the property, and the Phillips Petroleum Company's standard Two-Party Lease Agreements.

The Phillips Petroleum Company's Standard Lease Agreements or existing lease agreements used at Phillips service stations all over the country. (Tr. 119) The service station leases are to be between Ada Oil Company and Phillips Petroleum Co. The Service Station Agreement (Pl. Ex. 7, D.R. 36) requires that the lease rentals pay the full cost of the service station site and improvements. Therefore, the other provisions of the lease agreements are of no concern to Neely and he is not required, under Texas law, to approve their terms. *Pacific Mutual Life Ins. Co. v. Westglen Park, Inc.,* (Tex.Sup.Ct. 1959) 325 S.W.2d 113.

Petitioner's argument concerning the effect of the judgment below, if allowed to stand, borders on the ridiculous. The well-established Texas law, concerning which there is no dispute is that injunctive relief will be granted to restrain a violation by Neely of his covenant not to play football for a club other than the Houston Oilers, but that he cannot be required by mandatory injunction to play for Houston. *Mission Independent School District v. Diserens,* (Sup.Ct. of Tex., 1945) 188 S.W.2d 568; *Dallas Cowboys Football Club, Inc. v. Harris,* (Civ.App. Dallas, 1961) 348 S.W.2d 37, 42. Should Neely elect to play foot-

ball for Houston, then the service station site is obviously a valuable part of the consideration for his playing football, probably worth under Neely's own testimony at least $100,000 by the end of twenty years. (Tr. 281) Neely has made and is bound by his contract. This Court will not presume that Respondent, in the future, will not deal fairly with the Petitioner. However, Neely would not be compelled to accept a conveyance of a service station site if he chose for any reason not to accept it.

### 3. Ada Oil Company Was Not an Indispensable Party.

Respondent plead (D.R. 2), Petitioner admitted, (D.R. 61), and the Court of Appeals found (A.R. 3, p. 5) that the contract and agreement *between Houston Oilers, Inc. and Ralph Neely* consisted of seven instructions; i.e., the bonus clause, four American Football League contracts, the Real Estate Salesman Commission Agreement, and the Service Station Site Agreement *which constituted a single offer in writing made by the Houston Oilers and accepted by Ralph Neely.* The sole consideration from Neely for the conveyance to him of the station site was his agreement to play football for Houston. (Tr. 49-50) Although Ada Oil Company appears as a party to the service station agreement, examination of all the contract documents and the evidence makes it obvious that Respondent, Houston Oilers, is the real party in interest and that Ada, an affiliated corporation owned 100% by K. S. Adams, Jr. was named in the Letter Agreement to act for the Houston Oilers merely because that company was the jobber for Phillips '66 products in the Harris County area and was in a convenient position to carry out what was

in fact the primary obligation of the Houston Oilers; namely, to pay Neely that part of the consideration for playing football represented by the service station site.

Under Texas law whether it be considered that under the circumstances there is an identity of parties between the Houston Oilers and Ada Oil Company, that Houston Oilers stand in the position of a guarantor of the performance by Ada, or whether Ada is to act as an agent of Respondent, the requisite relationship exists so that Ada is bound under the doctrine of res judicata by the decision of the Court of Appeals.

The law is well-established in Texas that a plea of res judicata based upon a former suit is available against one not a party to the former suit who rests under a secondary or derivative liability which must have been considered and determined in the former litigation. *Eastland County v. Davisson,* (Tex.Comm.App. 1929) 13 S.W.2d 673, 676; *Butler v. Continental Oil Co.,* (Tex.Civ.App.) 182 S.W.2d 843, 845; *Green v. American General Ins. Co.,* (Tex.Civ. App. 1962) 354 S.W.2d 616, writ ref'd n.r.e.; Cf. *Employers Mutual Liability Co. v. Mosqueda,* 317 F.2d 609; see also, *Allstate Ins. Co. v. Brown,* (Tex.Civ.App. 1956) 289 S.W.2d 300; 34 Tex.Jur.2d 452.

Ada Oil Company was bound by the Judgment of the Court of Appeals and was not an indispensable party.

Furthermore, this Court has held that the indispensability of parties is determined on practical considerations. *Shaughnessy v. Pedreiro,* 349 U.S. 48, 99 L.Ed. 868, 75 S.Ct. 591; *Williams v. Fanning,* 332 U.S. 490, 92 L.Ed. 95, 68 S.Ct. 188. Applying that test, and under the record before the Court, Petitioner should not now be permitted to ignore the trial pleadings and the findings from the evidence and

to now raise this issue of indispensable parties. Petitioner first contended that Ada Oil Company was a necessary party while Petition for Rehearing was pending in the Court of Appeals. Petitioner should not be permitted by so doing to circumvent the finding made on the evidence that this contract was in fact between the Houston Oilers and Ralph Neely.

The pending action in the 133rd District Court of Harris County, Texas, styled "Ralph Neely, Plaintiff v. Ada Oil Company, Defendant" referred to in the Petition, is an action filed *after* the Court of Appeals for the Tenth Circuit had rendered its decision rejecting the same contentions there and here made by Petitioner pertaining to the service station agreement. The Texas District Judge, on motion of Respondent, has stayed the proceedings in the Texas case pending determination of the instant cause by this Court.

**4. Petitioner Cannot Properly Raise For the First Time in His Petition For Writ of Certiorari, an Issue Not Urged in The Courts Below That The Dallas Cowboys Football Team Was An Indispensable Party to This Action.**

This is an action brought by Respondent for declaratory judgment as to the validity of a contract between Respondent and Petitioner, and to enjoin a violation by Petitioner of the contract. The Dallas Cowboys Football Club is not a party to the contract, no adjudication is asked as to any of its contractual rights. That Petitioner, Ralph Neely, made a subsequent, separate and distinct contract with the Dallas Football Club does not make it a necessary party to this litigation. This third party could not have been served

with process in the Western District of Oklahoma where this action was instituted.

The Court should give no consideration to the fourth question presented by Petitioner because it was raised for the first time in the Supreme Court, and is not a proper ground for granting review on certiorari under Rule 19 of the Rules of the Supreme Court.

## CONCLUSION

The claimed conflict between the decision of the Court of Appeals for the Tenth Circuit and the decision of the Court of Appeals for the Fifth Circuit in *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., supra,* does not exist. The Court of Appeals properly construed and applied the Texas law pertaining to the statute of frauds. Petitioner's contentions pertaining to indispensable parties are unfounded and do not raise issues which are grounds for review by this Court on certiorari. No special or important reasons exist for review on certiorari by this Court. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## Certificate of Service

I hereby certify that a copy of the foregoing Brief was mailed to Angus G. Wynne, 2808 Southland Center, Dallas, Texas 75201, and to James D. Fellers and J. Howard Edmondson, 2700 First National Building, Oklahoma City, Oklahoma 73102, counsel for Petitioner, on August_____, 1966.

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APPENDIX "A"

# United States Court of Appeals

TENTH CIRCUIT

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NO. 8520 - MARCH TERM - 1966

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HOUSTON OILERS, INC., *Appellant,*

vs.

RALPH NEELY, *Appellee.*

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**Appeal From The United States District Court For The Western District of Oklahoma**

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William R. Eckhardt of the firm of Vinson, Elkins, Weems & Searls, Houston, Texas, and Gus Rinehart of the firm of Rinehart & Morrison, Oklahoma City, Oklahoma, for Appellant.

James D. Fellers of the firm of Fellers, Snider, Baggett & McLane, Oklahoma City, Oklahoma, and Thomas J. Moroney, Jr., of the firm of Wynne, Jaffe & Tinsley, Dallas, Texas, (Angus G. Wynne, Dallas, Texas, and J. Howard Edmondson, Oklahoma City, Oklahoma, with them on the brief) for Appellee.

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Before PICKETT, HILL and SETH, Circuit Judges.

PICKETT, Circuit Judge.

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This appeal concerns the validity of a professional football contract signed by Ralph Neely, a University of Oklahoma football player, and Houston Oilers, Inc., a Texas corporation which owns and operates a professional football team in the American Football League. Neely, a high school athlete of great promise, graduated from the Farmington, New Mexico high school in 1961, and found his way to the University of Oklahoma at Norman, Oklahoma. There his proficiency in football continued to develop, and in his senior year he became one of the nation's outstanding collegiate football players. He intended to play professional football and desired to take full advantage of the financial benefits arising from the rapidly growing popularity of professional football and the rivalry existing between the two major professional football leagues. Upon completion of the regular football schedule at the University of Oklahoma on November 28, 1964, the right to contract for Neely's services was awarded under a draft process to the Houston Oilers in the American Football League and to the Baltimore Colts in the National Football League.[1] On December 1, 1964, Neely signed American Football League Standard Players Contracts with Houston, each containing a "no-cut" clause, for the seasons 1965 through 1968, and received therefor a $25,000 bonus check. Thereafter Neely signed contracts with the Dallas Cowboys of the National

[1] Under the rules of both leagues, a club which selects a player in the regular course of the draft owns the exclusive right to contract for the services of that player.

Football League, which had acquired Baltimore's draft rights to Neely, and returned the Houston contracts and the $25,000 bonus check.

Houston thereupon brought this action for a judgment, declaring its contract with Neely to be valid and enforceable, and for an injunction restraining him from playing professional football with any team other than Houston. The trial court, in denying the relief sought, found that the contract was tainted with fraud and violative of the Texas Statute of Frauds. We hold that the undisputed facts in the record disclose a valid and enforceable contract.

Immediately after the draft on November 28, 1964, both Baltimore and Houston had set in motion their contract machinery to acquire the services of Neely. On that date Neely, while enroute to New York City to accept honors awarded him as an All-American choice and to participate in the Ed Sullivan television show, discussed his plans with representatives of the Baltimore team and was given a firm offer to sign a contract. On the same day, Breen, the personnel director of the Houston team, went to New York for the sole purpose of obtaining a commitment from Neely. Neely was accompanied by his father-in-law, Robert Forte, an Oklahoma City businessman, who participated in all the negotiations as advisor to Neely. In New York City, Neely advised Breen of the Baltimore offer,[2] but indicated that he preferred to play in the southwest. Neely

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[2] This offer was stated to be a $25,000 bonus and a four-year contract starting at $16,000 per year and escalating to $25,000 for the fourth year.

told Breen that in any contract negotiations he wanted to discuss an arrangement for off-season work. Breen assured Neely and Forte that such an arrangement could be worked out, but only K. S. Adams, Jr., President of the Houston Club, could discuss such proposals. For the purpose of continuing contract discussions, the three traveled to Houston, arriving there on November 30th. At a meeting attended by Neely, Forte, Adams and Martin, the club's General Manager, a four-year contract with a "no-cut" clause was offered to Neely. The offer provided for a $25,000 bonus and a salary of $16,000 per year. In addition, Adams agreed to secure employment for Neely with a local real estate firm at a guaranteed annual income of not less than $5,000. Adams also agreed that an oil company which he owned and controlled would construct a "conventional Phillips 66 Service Station" on a suitable location in Harris County, Texas, at an approximate cost of $30,000 to $60,000, and convey the same to Neely by special warranty deed, subject to the Phillips 66 lease and a deed of trust.

Neely was impressed with the offer but desired further time to consider it. On December 1, 1964, Adams was advised that the offer was accepted. In the meantime, Neely had conferred with his wife and the owner of the Baltimore Club. The Standard Players Contracts were then prepared and executed by the parties,[3] but were left un-

[3] These player contracts are identical to those signed by all A.F.L. players and, in substance, are the same as those used in the N.F.L.

dated. The letter agreement for additional employment, the filling station agreement; and the bonus check were dated December 1, 1964, and executed and delivered on that date. It is stipulated that these instruments constitute a single transaction. From the beginning of the discussions, Neely, for tax reasons, had insisted that the bonus money must be paid in 1964, and further, that the signing of the contract and the acceptance of the bonus money be kept secret to prevent him being declared ineligible to participate in the post-season Gator Bowl game on January 2, 1965, to which the University of Oklahoma had accepted an invitation. Any rational consideration of the evidence leads to the conclusion that all the parties knew that if Neely signed a professional football contract and received money therefor, under the rules of the N.C.A.A. and the Big Eight Conference, of which the University of Oklahoma was a member, he would consequently become ineligible to compete in the post-season game. Neely and Forte were advised that such a large sum of money could not be paid without a signed contract. It was then agreed that when the contract was signed, the $25,000 bonus check would be made payable to Forte as Trustee and that all the contract transactions would remain confidential, with no public announcement until after the Gator Bowl game.

After the contracts were executed, copies were delivered to Neely, he and Forte returned to Oklahoma. Later that day Houston's General Manager inserted the date "December 1, 1964" on the Standard Players Contracts and thereafter copies were filed with the A.F.L. Commissioner.

Neely testified that he understood the arrangement to mean that the contracts would not be effective or filed until after the post-season game. However the contracts provide in plain language that they shall be valid and binding immediately upon execution and that a copy shall be filed with the League Commissioner within ten days thereafter.[4] The A.F.L. rules also require the filing of all player contracts within 10 days after execution.

Immediately upon his return to Oklahoma, Neely was advised that the Dallas Cowboys, another team in the N.F.L., had obtained Baltimore's draft rights and desired contract discussions with him. Forte made several trips on behalf of Neely, and, unknown to Houston, Neely's contracts were forwarded to Dallas' attorneys for examination. Neely signed letters dated December 29, 1964, prepared by attorneys for Dallas, addressed to Houston and Adams, advising that he did not consider himself bound by the contracts and was withdrawing therefrom. The $25,000 bonus check was returned. These letters were received by Houston and Adams on December 31st. On that date the

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[4] Each of the Players Contracts contain this provision:

"18. Upon its execution, this contract shall be valid and binding immediately upon the parties hereto. A copy of this contract shall be filed by the club with the Commissioner within ten (10) days after execution. Within ten (10) days after its filing in the League office, the Commissioner shall have the right to terminate this contract by his disapproval in accordance with and pursuant to the powers vested in him by the Constitution and the By-Laws of the League. If so terminated, the Commissioner shall promptly give both parties written notice of such termination and thereupon both parties shall be relieved of their respective rights and obligations hereunder."

Dallas Club deposited $25,000 to the account of Neely in a Dallas bank. Prior to any publicity of the matter, Neely, apparently sensing trouble after the return of the Houston contracts, advised his coach in Jacksonville, Florida, where the Oklahoma team was preparing for the Gator Bowl game, of his activities in regard to the Houston contract. At about midnight on December 31st, Neely was notified that there had been some publicity concerning his signing with Houston. On January 1, 1965, Neely was advised that he had been declared ineligible to participate in the Gator Bowl game. There is no evidence from which it can be inferred that any publicity by Houston brought about this action. That evening Neely signed a contract to play with Dallas for the 1965 through 1968 seasons. He played for Dallas during the 1965 season and will continue to do so unless enjoined therefrom.

Neely was over the age of 21 years, and it is stipulated that he had "special, exceptional, unique knowledge, skill and ability as a football player." He was competent to enter into a valid contract to perform these services exclusively for a designated person or organization, and upon agreeing to so limit his services, he was subject under Texas law, which the parties agree is controlling, to be enjoined from performing them for anyone else.[5] Dallas Cowboys

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[5] The players contracts signed by Neely provide:

"5. The Player promises and agrees that during the term of this contract he will not play football or engage in activities related to football for any other persons, firm, corporation or institution except with prior written consent of the Club and the Commissioner . . ."

Football Club, Inc. v. Harris, Tex., 348 S.W.2d 37; Mission Independent School Dist. v. Diserens, Tex., 188 S.W.2d 568.

Disagreement over the validity of these contracts does not arise out of the provisions contained therein, but from an extrinsic oral understanding that their existence was to be kept secret until after the post-season game. The essence of Neely's contentions before the trial court and here is that the contracts are unenforceable because Houston falsely represented that the effective date of the agreement would be January 2, 1965, and that Houston's filing of the contract copies with the Commissioner was a violation of its promise to keep the matter secret. The trial court was of the opinion that these alleged misrepresentations constituted fraud in the inducement of the contract which would subject it to rescission. As has been heretofore stated, each contract specifically provides otherwise. Neely does not say he was so naive that he did not know his eligibility for further inter-collegiate football competition would be destroyed when he signed a professional football contract and received the bonus money.[6] The record is

[6] Neely testified: "Q. But you did know that if you took money for playing football that that would make you ineligible to play college football, didn't you? A. Took money, yes sir."

In regard to the acceptance of expense money for the trip to Houston, which is also a violation of inter-collegiate rules, he testified: "Q. Isn't it true, Ralph, that you well knew that any time your expenses were paid by a professional football team, that made you ineligible to play football? A. I suspected it, but I didn't know."

too clear for any misunderstanding that the purpose of secrecy surrounding the execution of the contracts was not to preserve Neely's eligibility, but rather to prevent his ineligibility from becoming known; otherwise there was no need for secrecy. This is illustrated by his later dealings with Dallas which similarly were not publicized, although a $25,000 deposit was made to his credit on the 31st day of December, 1964, thereby permitting him to report that amount as income for the year 1964 in his income tax return. The acceptance of this money ended his eligibility.

The trial court's conclusion that Houston represented to Neely that he would remain eligible if the contracts were kept secret is not supported by the record. As has been stated, it is apparent that Neely knew his eligibility was lost the instant he completed the Houston transaction and took the bonus money. Furthermore, the only claimed violation of the secrecy agreement was that Houston filed the contract with the League Commissioner. Nothing issued from the Commissioner's office occasioned the declaration of ineligibility. The scheme to mislead Neely's school, his coaches, his team, and the Gator Bowl opponents, no doubt would have succeeded but for Neely's own double dealing with Dallas, resulting in his attempt to avoid the Houston contracts. While we do not for a moment condone the ruthless methods employed by professional football teams in their contest for the services of college football players,

including the lavish expenditure of money,[7] it must be conceded that there is no legal impediment to contracting for the services of athletes at any time, and the above-mentioned conduct, while regrettable, does not furnish athletes with a legal excuse to avoid their contracts for reasons other than the temptations of a more attractive offer. Although there are many dismal indications to the contrary, athletes, amateur or professional, and those connected with athletics, are bound by their contracts to the same extent as anyone else, and should not be allowed to repudiate them at their pleasure.

Fraud has been defined in Texas as "the successful employment of cunning, deception, or artifice to circumvent, cheat or defraud another to his injury." International Life Ins. Co. v. Herbert, Tex., 334 S.W.2d 525, 530. This court has said that fraud "is never imputed or presumed and the court should not sustain findings of fraud upon circumstances which at the most create only suspicion." Davis v. C.I.R., 184 F.2d 86, 87. The draft system in professional football limited Neely's negotiations intially to Baltimore

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[7] These methods and their adverse effect upon amateur football players were described by Judge Skelly Wright in Detroit Football Company v. Robinson, 186 F.Supp. 933, 934, where he said:

"This case is but another round in the sordid fight for football players, a fight which begins before these athletes enter college and follows them through their professional careers. It is a fight characterized by deception, double dealing, campus jumping, secret alumni subsidization, semi-professionalism and professionalism. It is a fight which has produced as part of its harvest this current rash of contract jumping suits. It is a fight which so conditions the minds and hearts of these athletes that one day they can agree to play football for a stated amount for one group, only to repudiate that agreement the following day or whenever a better offer comes along."

and Houston. His collegiate football record was such that he and his father-in-law could anticipate that his services would be in demand and would command a premium contract. The opportunity presented to Neely would come but once in his lifetime, and it is understandable that the situation would be exploited to the maximum. It was with this background that Neely negotiated with Houston and Baltimore. Neely, a bright young man,[8] ably advised by his father-in-law, knew exactly what he wanted. With commendable foresight, he sought not only a favorable contract, but also a business arrangement extending beyond his football days. Houston, through its president, undertook to meet this requirement. Neely, after consulting his wife and father-in-law, and after further discussion with Baltimore, accepted Houston's final proposal, which he characterized as a "fine offer." Unexpectedly Dallas arrived on the scene, and Neely found another bidder for his services. He welcomed this new opportunity and apparently plans were set in motion designed to convince him that he could ignore the existing agreements with Houston. The first indication that Houston had of Neely's dissatisfaction with his arrangement was when the contracts were received in the mail on December 31, 1964. Up to that time there had been no publicity, and Neely was in Jacksonville prepared to play in the January 2nd game. Representatives of Houston were there to arrange for the photographing of a simulated contract-signing

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[8] Neely graduated from the College of Business Administration at the University of Oklahoma with a double major in accounting and finance.

ceremony immediately after the game. It was Neely, not Houston, who disclosd to his coach the facts which brought about a declaration of his ineligibility. Even then Neely had lost his eligibility through his transactions with Dallas. There is insufficient evidence to sustain a finding of material misrepresentation on the part of Houston amounting to fraud which would affect the validity of the contracts. It is true that Neely testified that it was his understanding that the contracts were not to become effective until after the game on January 2nd. The contracts, however, provided otherwise, and we are not at liberty to rewrite them. Furthermore, the letter of employment, the filling station arrangement, and the $25,000 bonus check which was delivered upon the execution of the contracts, were all dated December 1, 1964.

The trial court, in denying the relief sought, apparently applied the equitable maxim that "he who comes into equity must come with clean hands." This doctrine, fundamental in equity jurisprudence, means that equity will not in any manner aid a party whose conduct in relation to the litigation matter has been unlawful, unconscionable, or inequitable. See, Garland v. Brown, Tex., 52 F. Supp. 401. But the doctrine does not exclude all wrongdoers from a court of equity nor should it be applied in every case where the conduct of a party may be considered unconscionable or inequitable. Office Employees Internat'l Union v. Houston Lighting & P. Co., Tex., 314 S.W.2d 315; Kirkland v. Handrick, Tex., 173 S.W.2d 735. The maxim admits

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of the free exercise of judicial discretion in the furtherance of justice. See, Johnson v. Yellow Cab Co., 321 U.S. 383. While it is not contended here that Houston did not have a legal right to sign Neely to a professional player's contract, it is urged that when Houston participated in a scheme to conceal that fact for the purpose of permitting an ineligible player to participate in a post-season game, it was such deceit upon others that a court of equity should not intervene to assist in the enforcement of the contract. With this argument we cannot agree. It is neither unlawful nor inequitable for college football players to surrender their amateur status and turn professional at any time. Neely was free to bind himself to such a contract on December 1, 1964 as he would have been after January 2, 1965. Nor was Houston under any legal duty to publicize the contract or to keep it secret. Its agreement to keep secret that which it had a legal right to keep secret cannot be considered inequitable or unconscionable as those terms are ordinarily used in contract negotiations. Neely relies on the case of New York Football Giants v. Los Angeles Chargers F. Club, Inc., 5 Cir., 291 F.2d 471, where, in a somewhat similar situation, the court applied the clean hands doctrine. It is quite apparent that the player contract in that case was acquired under circumstances much different from those in this case, but if the rule announced in that case was intended to apply to every instance in which a contract is entered into with a

college football player before a post-season game with an understanding that it be kept secret to permit that player to compete in the game, then we must respectfully disagree with the conclusion.

The trial court held that the service station agreement violated the Texas Statute of Frauds, Art. 3995, Revised Civil Statutes of Texas, as amended; Vernon's Anno. Texas Statutes, Art. 3995, in that it is vague, indefinite, uncertain and unenforceable. The letter agreement specifically provides that the service station will be for the sale and distribution of Phillips '66 products and that Ada Oil Company will arrange for the construction of a "conventional Phillips '66 Service Station of either Series ER 2000, ARS 201 or DRS 201", and be financed according to the plan selected. It is clear from the unqualified language of the instrument that the station site, the type of station, and the financing thereof is to be determined by Ada Oil Company within the limits specified, without the necessity of further agreement. Such writing satisfies the Texas Statute of Frauds. Tiller v. Fields, Tex., 301 S.W.2d 185.

REVERSED and REMANDED with instructions to grant the injunction.

## APPENDIX "B"

## TEXAS REVISED CIVIL STATUTES

### Art. 3995. Writing required.

No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized:

1. To charge any executor or administrator upon any promise to answer any debt or damage due from his testator or intestate, out of his own estate; or,

2. To charge any person upon a promise to answer for the debt, default or miscarriage of another; or,

3. To charge any person upon any agreement made upon consideration of marriage; or,

4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year; or,

5. Upon any agreement which is not to be performed within the space of one year from the making thereof. Acts 1840, p. 28; P.D. 3875; G.L. vol. 2, p. 202.